Supreme Court, U.S
FILED
JAN 16 2009
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(3)

No. 08-599

IN THE

Supreme Court of the United States

LAUREN BROWNING,
Petitioner,

v.

SOUTHWEST RESEARCH INSTITUTE,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS CASE IS SUITABLE FOR CERTIORARI

Respondent asserts that "[b]ecause the decision below is an unpublished, non-precedential disposition, it is not even precedent in the Fifth Circuit, which itself renders this case unsuitable for certiorari" (Opp., p. 2, fn 1). For this proposition, Respondent cites Robert L. Stern, et al., *Supreme Court Practice* 459 (8th Ed. 2002). The 2002 Stern treatise states:

> The Court occasionally grants certiorari to review unpublished opinions, but it does not

> ordinarily do so and the fact that an opinion is unpublished is relevant to the Court's consideration of the need for review.

The 2007 Stern treatise addresses this subject under the heading of "Importance of Issues Involved." Robert L. Stern, et al., *Supreme Court Practice* 262-63 (9th Ed. 2007). The current Stern treatise notes the respondent can argue a case is uncertworthy because the opinion below is unpublished and under circuit rules lacks precedential value but then states the Court does grant certiorari to review unpublished decisions (*id.* at 506), adding:

> With the increased use of unpublished and summary decisions in federal and state intermediate appellate courts, one might think that the Supreme Court would presume such decisions to be unimportant. To the contrary, however, the Court grants certiorari to review unpublished and summary decisions with some frequency. (citations omitted). Indeed, Justice Stevens has indicated that he "tends to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify."

The Fifth Circuit's unpublished decision in *Browning* warrants review because:

1. The decision relates to important federal statutory issues, namely, federal laws prohibiting sex discrimination in employment, by way of promotion discrimination, retaliation, and constructive discharge.[1]

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[1] Many times the Supreme Court reviews cases on certiorari where they involve the construction and application of acts of

2. The petition addresses important federal procedural issues that implicate the Court's supervisory power, specifically, whether district courts and courts of appeals may, contrary to *Reeves*[2] and *Burlington*,[3] use guidelines or checklists that exclude from consideration evidence favorable to the non-movant employee.[4] The six or seven factor checklist is not in any of the federal statutes. The checklists are pre-*Reeves* and pre-*Burlington*. A claimant with factors "on the list" has a better chance of getting her trial than one who does not (even if the list is non-exclusive). *Burlington* held that context matters in determining whether an assignment is materially adverse. In *Browning*, denials of promotion (a better assignment) is not on the checklist and does not count. Per *Browning* (and other published and unpublished Fifth Circuit decisions) hitting the glass ceiling cannot, as a matter of law, establish constructive discharge. This is a judicial presumption, contrary to *Reeves*, *Burlington* and the underlying statutes. The Fifth Circuit presumes conclusively that women, minorities, and older people would be unreasonable if they felt compelled to resign when shown that their careers were at a dead end. This issue may not seem important to Respondent, but it

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Congress, both where there is a conflict in circuits and in cases where the importance of the issues is the major basis for securing review. *Id.* at 267.

[2] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[3] *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[4] The Court sometimes grants certiorari in cases involving federal practice and procedure by reason of the importance of such matters. *Id.* at 273.

is vital to the people for whom these federal laws were written.

3. The case below, though unpublished, represents a trend in the Fifth Circuit in constructive termination cases, where the Court of Appeals drops the "non-exclusive" qualifier from the check list factors and weighs evidence contrary to *Reeves*; and

4. There is a growing split in the circuits on the use of an exclusive list of aggravating factors to make summary judgment rulings in constructive discharge cases.

II. THE BRIEF IN OPPOSITION STATES THE FACTS FAVORABLY TO RESPONDENT

Under *Reeves*, courts in summary judgment analysis must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence; they must give credence to the evidence favoring the non-movant, and give credit only to uncontradicted and unimpeached evidence from the moving party where that evidence comes from disinterested witnesses. *Reeves*, 530 U.S. at 150-51 (2000). Respondent's counterstatement of facts states the summary judgment evidence favorably to the moving party, Respondent. For example:

1. Respondent states as a fact that Browning's employment was never in jeopardy. (Opp. 5). This is contrary to Petitioner's evidence that in January 2001, her boss told her she was "crazy" if she thought she was being underpaid because of her gender (Pet. App. 51a). In February, 2002, Browning's boss indicated he would be happy if she quit by pointing to the door and replying, "If you don't think what we

[management] are doing is fair, then there is the door." (Pet. App. 58a). After Browning renewed her unequal pay and rank concerns in January 2003, Browning's boss told her that he had grounds to "terminate [her] employment for cause" and that "Texas is a right to work state." (Pet. App. 56a).

2. Respondent's statement of facts asserts that evaluations of Browning's work "recognized her professional contributions in a positive and encouraging manner, while providing counseling where necessary." (Opp. 6). Respondent leaves out harsh criticisms and badgering statements to Browning that occurred after she began complaining of wage disparity based on gender.

3. Respondent asserts Browning "never complained she was being paid unequally to males performing similar work." (Opp. 7). This "fact" discredits or disbelieves Browning's evidence that in January 2001, as they discussed her annual performance review, Browning showed Pearcy an American Chemistry Salary Survey, pointed out a section stating that female scientists in her field earn less than their male counterparts, then asked Pearcy, "Is this what's happening to me?" (Pet. App. 51a).

4. Respondent asserts Patrick never threatened Browning's job. (Opp. 9). This statement of "fact" views the evidence favorably to Respondent and discredits Browning's testimony that, after reviewing the note on the back of her performance evaluation about Brownings' concerns of being paid less than her male peers warranting scrutiny, Patrick in February 2003 confronted her about what she had written in an intimidating manner and threatened her job by saying he could fire her right then and there for

cause, and reminding her that Texas was a right to work state. (Pet. App. 56a).

III. THE FIFTH CIRCUIT SPLITS WITH OTHER CIRCUITS AND APPLIES AN EXCLUSIVE CHECKLIST APPROACH

The Opposition Brief incorrectly states that the Fifth Circuit applies "aggravating factors" nonexclusively as part of a review of all the evidence. (Opp. 14-17).[5] Before *Reeves* (decided by this Court June 12, 2000), the Fifth Circuit rendered its decision in *Barrow v. New Orleans Steamship Assn.*, 10 F.3d 292, 297 (5th Cir. 1994). *Barrow* stated the list of seven factors was "not exclusive." *Barrow*, 10 F.3d at 297. For awhile the "nonexclusive" qualifier remained. In *Ward v. Bechtel Corp.*, 102 F.3d 199, 2002 (5th Cir. 1997), the Fifth Circuit noted the list of factors in *Barrow* is "nonexclusive."

Before *Reeves*, the Fifth Circuit dropped the "nonexclusive" qualifier in *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000). The Fifth Circuit noted that "Brown clearly proved two of the constructive discharge factors," but upheld summary judgment on Mr. Brown's constructive discharge claim. The Fifth Circuit's *Brown* decision illustrates the way the "factors" work to reject evidence that might lead a reasonable person in the employee's position to feel compelled to resign; applying the "factors" rigidly, the Fifth Circuit opined that Brown's reassignment was irrelevant to his constructive discharge case, since it

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[5] In a backwards way, Respondent seems to agree that use of the checklist as the exclusive aggravating factors would be error under *Reeves* and *Burlington*. Respondent states, "The non-exclusive use of aggravating factors is entirely consistent with [the Court's 'context matters' statement in *Burlington*]." Opp. 22.

did not involve "menial or degrading work" and since he still supervised staff (although fewer people reported to him).[6] *Brown*, 207 F.3d at 782. Though the evidence fulfilled factor five, the Fifth Circuit rejected as qualifying evidence the fact that Brown was reassigned to work for a younger supervisor. To do this, the panel viewed the evidence favorably to the employer, reasoning that the younger supervisor was only three years younger and a personal friend of Brown. *Id.* The Fifth Circuit in *Brown* omitted any reference or hint that the seven factors were "nonexclusive." *Id.* at 782-83.

Post-*Reeves* (January 15, 2000) in *Brown v. Kinney Shoe Co.*, 237 F.3d 556, 566 (5th Cir. 2001), the Fifth Circuit again dropped the "nonexclusive" qualifier. The court listed the seven *Barrow* factors (from the age discrimination case), despite the fact that Lloyd Brown complained of race discrimination. *Brown v. Kinney Shoe Co.*, 237 F.3d at 566.

Next, the Fifth Circuit in an unpublished decision rejected the constructive discharge case of a female medical doctor despite nineteen facts supporting her claim of constructive discharge. *Reznick v. Associated Orthopeadics & Sports Medicine, P.A.*, 104 Fed.Appx. 387 (5th Cir. 2004). The Fifth Circuit (in a sex discrimination case) again listed the seven *Barrow* factors. *Reznick*, 104 Fed.Appx. at 392, and made no indication that the list is "nonexclusive." Evidence on Reznick's list that did not fit one of the seven factors, did not count.

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[6] This wooden rule is contrary to *Burlington N. & Santa Fe Rwy Co.*, 598 U.S. at 67-71 (reassignment may be actionable retaliation, depending on context; even a schedule change may be actionable retaliation).

In *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007), a race and sex discrimination case, the Fifth Circuit listed six factors, but did not hint that the list was "nonexclusive." In *Aryain v. WalMart Stores*, 534 F.3d 473, 480-81 (5th Cir. 2008) (another non-age discrimination case), the Fifth Circuit listed six factors, but did not hint there was any flexibility or that the list is "nonexclusive."

In the underlying sex discrimination case, *Browning v. Southwest Research Institute*, 288 Fed.Appx. 170, 180 (5th Cir. 2008), the Fifth Circuit listed seven factors, did not hint that the factors were "nonexclusive," and approved the trial court's rulings that refusal to promote and mere discrimination do not count (they are not factors). The Fifth Circuit's discussion of Browning's evidence failed to count her glass ceiling allegations and failed to construe her evidence as "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation" (citing factor six) where she showed that she had been shown the door, told she was crazy, told that she was not likely to be promoted, and learned a person had been brought in to do her job.

In the Fifth Circuit following *Reeves*, the six or seven factors have *de facto* become inclusive. The Opposition Brief cites two district court cases within the Fifth Circuit rendered in 2008 where the district courts mentioned the list was nonexclusive and then states:

> Thus, there is no doubt that courts within the Fifth Circuit understand that they are not bound to use an exclusive checklist, and will affirm constructive discharge based on "relevant" or "aggravating" factors outside the *Barrow* factors.

(Opp. 17)(emphasis added). There is certainty that some courts within the Fifth Circuit (district courts and the Fifth Circuit itself) do not understand the *Barrow* factors are non-exclusive. The district court in Browning's case listed the seven *Barrow* factors and failed to note the list was non-exclusive. (Pet. 31a). The magistrate, whose opinion was accepted in full by the district court, went on to emphasize that proof of harassment generally would not suffice, as a matter of law, some kind of extreme harassment must be shown:

> "To prevail on a constructive discharge claim, a plaintiff must ultimately show a greater degree of harassment than that required for a hostile work environment claim." (citing authority).

The magistrate's opinion emphasized that bad treatment that falls outside the seven factors on the checklist does not count as evidence for constructive discharge claimant, stating:

> "Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge, as is a discriminatory failure to promote."

(Pet. 31a) (citing *Brown v. Kinney Shoe Co.*, 237 F.3d at 566).

The Opposition Brief argues there is no split in the circuits as to the use of "relevant" or "aggravating" factors. Part of this argument, Respondent's argument that the Second, Ninth, Tenth, and District of Columbia Circuits do not use the checklist approach, supports Petitioner's arguments as to these circuits. Respondent's arguments as to the Third and Sixth Circuits, which Petitioner contends side with the Fifth Circuit in applying the checklist exclusively, fail

to note Petitioner's acknowledgement that "[t]hese circuits sometimes state that these factors are not exhaustive." (Pet. 12). While slippage from "non-exclusive" in the Third and Sixth Circuits does not approach what has evolved in the Fifth Circuit, both the Third and Sixth Circuits have issued constructive discharge decisions post-*Reeves* that use the checklist without any hint that the listed factors are not exclusive. See *Stremple v. Nicholson*, No. 06-3807, 2008 WL 3919376, at *3 (3d Cir. Aug. 27, 2008) (slip opinion); *Kinamore v. EPB Elec. Utility*, 92 Fed.Appx. 197, 205 (6th Cir. 2004).

IV. THE BRIEF IN OPPOSITION MISSES PETITIONER'S POINT AS TO *REEVES*

In two ways, the Opposition Brief misses Petitioner's point as to *Reeves*: First, a central theme of the brief in opposition is variously stated as: the Petition is an inappropriate request for this Court to review facts, not law (Opp. 1), "[t]his is a fact-intensive employment case" (Opp. 2), "[e]mployment law cases present factually dense and context-bound scenarios (Opp. 3)", and "[n]othing in these holdings contradicts *Reeves* or calls for an extraordinary exercise of this Court's supervisory power to consider the application of settled law to a dense set of facts." (Opp. 27).

Respondent's argument, that this case involves a "dense set of facts" and that Petitioner seeks to draw the Court into reviewing fact determinations misstates Petitioner's argument and misses a central point about Petitioner's effort to obtain a writ of certiorari in this case. While Respondent has restated the facts in this case, in a way more favorable to Respondent, and has attempted to argue its side of the facts, Petitioner is seeking certiorari on

Question 2 (paraphrased): whether the courts must adhere to *Reeves* standards of reviewing evidence in employment discrimination cases of all kinds; whether the courts or juries resolve disputes where there is a "dense set of facts."

This is what is happening in *Browning*, and other post-*Reeves* constructive discharge cases, particularly in the Fifth Circuit: First, the trial court, then the appellate court, lists some of the facts that the claimant says are sufficient to constitute her *prima facie* evidence of an adverse action – constructive discharge. Then the court, not a jury, decides, as a matter of law, that these facts are not sufficient to warrant a reasonable person to resign. Along the way, the courts, particularly in the Fifth Circuit, use a seven (sometimes six) factor list that literally means some evidence does not count as a matter of law. This is the same kind of judicial assessment of evidence that was happening prior to *Reeves*. (*See* Pet. 22-23). Respondent opposes certiorari by asking this Court to resolve disputed facts, and to do so in its favor.

Second, the Opposition Brief does not squarely address the grounds for certiorari in this matter. This petition seeks guidance on crucial questions of how the lower courts should review evidence in discrimination cases that do not involve outright termination, and whether checklists or guidelines, even non-exclusive ones, impinge upon employee rights under federal discrimination laws. The Opposition Brief only partly addresses this, and only in one sentence, where Respondent assumes that the courts uniformly use non-exclusive checklists:

> The Fifth Circuit's and the other circuits' use of non-exclusive aggravating factors embraces

> *Burlington's* direction regarding context while making use of precedent in other constructive discharge cases to foster a judicially administrable approach to reviewing evidence of constructive discharge. Nothing in that approach remotely warrants certiorari.

Opp. 22 (emphasis added). Without directly acknowledging that any list of factors, even one that is non-exclusive, has the effect of inhibiting a review of the totality and the cumulative effect of the non-movant's evidence, and without acknowledging *Reeves* at all, Respondent is saying that this is convenient for courts and the possibility that some claimants lose their day in court because of this method of review is unimportant.

The Opposition Brief understates the implications of *Reeves* by arguing that the Court's "fundamental concern in *Reeves*" dealt with the split in the circuits as to the need for "pretext-plus" evidence. (Opp. 23-24). While the Court granted certiorari over that issue, addressed and resolved it (*Reeves*, 530 U.S. at 140-49), the Court went on to address "the remaining issue." *Id.* at 149-54. That issue was the manner of assessing evidence utilized by the Fifth Circuit Court of Appeals, which this Court found to be improper.

The Opposition Brief incorrectly suggests that *Burlington* modifies *Reeves* with its language about how "context matters." (Opp. 27). The point of *Burlington* certainly was not to weaken *Reeves* so that judges began weighing facts in context. *Burlington* was talking about relevant evidence, not the role of the judge in sifting and weighing evidence as to context as the Fifth Circuit did in sorting through, dismissing, and minimizing Browning's evidence while crediting Respondent's evidence as a basis for

upholding summary judgment as to constructive discharge, retaliation, and promotion claims.

CONCLUSION

For all the reasons stated herein and in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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